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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

METROMEDIA, INC., et al.,
Petitioners,

vs.

APRIL ENTERPRISES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI...1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT.....3

A. THE BANKERS LIFE PRUDENTIAL CONCERNS AND DESIRE NOT TO SHORT-CIRCUIT "A NUMBER OF LESS INTRUSIVE, AND POSSIBLY MORE APPROPRIATE, RESOLUTIONS" OF THESE "FAR-REACHING" ISSUES, WOULD BECOME WHOLLY ILLUSORY IF THE COURT PUT A SIX-MONTH TIME LIMIT ON ITS INVITATION.....3

B. METROMEDIA NOT ONLY FAILED TO PRESERVE ITS PRESENT CHALLENGES TO PUNITIVE DAMAGES BY NOT RAISING THEM PRIOR TO VERDICT, BUT ELECTED TO WAIVE THEM UNDER CALIFORNIA LAW BY AFFIRMATIVELY REQUESTING THE TRIAL COURT TO INSTRUCT THE JURY REGARDING THE RECOVERY OF PUNITIVE DAMAGES AND TO DECIDE THE ISSUE BY A PREPONDERANCE OF THE EVIDENCE.....6

1. Waiver 6

2. Filure To Raise The Issue Prior To Verdict 8

Page

C. THIS CASE IS THE ANTITHESIS OF THE "APPROPRIATE SETTING" FOR RESOLUTION OF THESE "FAR-REACHING" ISSUES. 11

1. Not Only Has The California Legislature Not Had The Opportunity To Address The Issue, But, Eight Months Prior To *Bankers Life*, And Two Years Subsequent To The Trial Of This Case, It Revamped And Restricted The Law Of Punitive Damages, Thereby Rendering This Case Of Historical Interest Only To The Court 12

2. The California Supreme Court Issued No Opinion Whatsoever, Let Alone A "Well-Developed Record and Reasoned Opinion On The Merits," And The Intermediate Court Of Appeal Opinion Was Unpublished And Devoted But Three Sentences To Rejecting The "Procedural Due Process" Challenge Only. 14

3. Although The California Supreme Court Has Stricken Down Civil Fines Under The Excessive Fines And Due Process Provisions Of The State Constitution, Metromedia Elected Not To Press The State Constitutional Grounds In The State Courts. 15

Page

4. California Punitive Damage Law Provides For Well-Defined Definitions Of Proscribed Conduct, Specific And Proportional Criteria On Which The Amount Of The Award Must Be Based, And Extremely Strict Review By The Trial And Reviewing Courts — In Theory And In Practice. 18

(a) Only 9% Of The Punitive Damage Dollars Awarded In California Survive Judicial Review. 18

(b) California Trial Courts, On Motions For New Trial, Sit As "Independent Triers Of Fact," And Are Mandated To Reweigh The Evidence And To Review Jury-Decided, Punitive Awards. 19

(c) California Appellate Review of Punitive Awards Is Equally Strict. 20

(d) California Law Imposes Multiple And Well-Defined Standards Of Proportionality, Which The Trier of Fact, Trial Court and Reviewing Courts Are Obligated To Apply. 20

(e) The Award Here Was Constitutionally Proportional To The Compensatory Damages (*i.e.*, Treble), The Defendant's Ability To Pay (*i.e.*, One Week Of Net Income), And The Defendant's Conduct (*i.e.*, Actual Malice). 22

Page

5. In California, Evil Motive Is The Central Element Of Malice And Is Not Established By Conduct Which Is Unreasonable, Negligent, Grossly Negligent Or Reckless. 23

D. BY ROTELY TRANSFERRING THE CONSTITUTIONAL ARGUMENT FROM A WHOLLY STANDARDLESS AND NON-PROPORTIONAL PUNITIVE DAMAGE SYSTEM TO A REGULATED AND PROPORTIONAL SYSTEM, THE ARGUMENT LOSES IT LOGIC AND NECESSARILY LEADS TO THE "CONSTITUTIONALIZATION" OF THE CIVIL DAMAGE SYSTEMS OF ALL FIFTY STATES. 24

E. NON-FIRST AMENDMENT DEFENDANTS WHO ACT WITH ACTUAL MALICE ARE NOT DESERVING OF GREATER CONSTITUTIONAL SAFEGUARDS AGAINST PUNITIVE DAMAGES THAN THOSE AFFORDED DEFAMATION DEFENDANTS UNDER THE FIRST AMENDMENT. 28

CONCLUSION 30

APPENDIX A

Excerpts From Reporter's Trial Transcript Testimony of Metromedia Vice President Richard Woollen A-1

Page

APPENDIX B

California Statutes Regulating Punitive Damages . . . B-1

APPENDIX C

Petition For Review Filed July 10, 1988, Pages 11, 12, 13 . . . . . C-1

APPENDIX D

Defendant Metromedia's Proposed Jury Instruction No. 85 . . . . . D-1

APPENDIX E

Defendant Metromedia's Proposed Jury Instruction No 56 . . . . . E-1

APPENDIX F

Trial and Reviewing Court Action on Punitive Awards F-1

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Insurance Co. v. Lavoie
475 U.S. 813, 505 So.2d 1050 (1986) 2, 5, 25

Aluminum Company of America v. Sliman
No. 86-1569, *cert. denied* 108 S.Ct. 2013
(case below, 112 Idaho 277) (1988). 3

Atlantic Richfield Company v. Nielsen (1988)
No. 87-1196, *cert. denied* 108 S.Ct. 2023 3

Bankers Life and Casualty Co. v. Crenshaw
108 S.Ct. 1645 (1988) . . . . . *passim*

Barbour v. State of Georgia
249 U.S. 460 (1919) 10

Beagle v. Vasold
65 Cal.2d 166 (1966). 25

Bertero v. National General Corp. (1974)
13 Cal.3d 43, 118 Cal.Rptr. 184 25

Bidart Bros. v. Elmo Farming Co. (1974)
35 Cal.3d 248 9

Blackman v. MacCoy (1959)
169 Cal.App.2d 873, 339 P.2d 169 17

Browning-Ferris Industries of Vermont, Inc. v.
Kelco Disposal, Inc.
No. 88-____, pet. for cert. filed Sept. 1988 . . . . . 4, 22

Page

CNA Casualty Co. of California v. Rouhe
No. 88-297, pet. for cert. filed, August 18, 1988 5

Collins v. Lucky Markets, Inc. (1969)
274 Cal.App.2d 645, 79 Cal.Rptr. 454. 20

Curtis Publishing Co. v. Butts
388 U.S. 130, 87 S.Ct. 1975,
18 L.Ed.2d 1094 (1967). 29

Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.
105 S.Ct. 2939, 472 U.S. 749,
86 L.Ed.2d 593 (1985) 26, 29

Exxon Corp v. Eagerton
462 U.S. 176 (1983) 10

Ferraro v. Pacific Finance Corp. (1970)
8 Cal.App.3d 339, 87 Cal.Rptr. 226. 20

G.D. Searle & Co. v. Superior Court of
Sacramento (1975)
49 Cal.App.3d 22, 122 Cal.Rptr. 218. 24

Garcia v. United States
769 F.2d 697 (11th Cir. 1985) 26

Gertz v. Robert Welch, Inc.
418 U.S. 323, 94 S.Ct. 2997,
41 L.Ed.2d 789 (1974). 29

Goodyear Tire & Rubber Co. v. Hodder
No. 88-____, pet. for cert. filed Oct. 14, 1988 . . . . . .4, 5

Page

Grayson v. Harris
267 U.S. 352 (1925) 23

Gregg v. Georgia
428 U.S. 153 (1976) 26

Hale v. Morgan (1978)
22 Cal.3d 388, 584 P.2d 512 . . . . . .16, 17

Hall v. Beals
396 U.S. 45 (1969) 13

Hershey v. Reclamation District No. 108 (1927)
200 Cal. 550 9

Hodder v. Goodyear Tire & Rubber Co.
426 N.W.2d 826 (Minn. 1988). 4, 5

Illinois v. Gates
462 U.S. 213 (1983) 11

John Hancock Variable Life Ins. Co. v. Pierce
No. 87-1535, *cert. denied* 108 S.Ct. 2015 (1988) 3

Lockett v. Ohio
438 U.S. 586 (1978) 26

Mobile Dodge, Inc. v. Alford
No. 86-107, *cert. denied* 108 S.Ct. 2008
(case below, 487 So.2d 866) (1988). 3

Nationwide Mutual Insurance Co. v. Clay
No. 88-57, petition filed July 27, 1988
525 So.2d 1339 (Ala. 1987). 4, 21, 25

Page

Neal v. Farmers Ins. Exch. (1978)
21 Cal.3d 910, 148 Cal.Rptr. 389 . . . . . 19, 20, 22

Nelson v. Justice Court (1978)
86 Cal.App.3d 64, 150 Cal.Rptr. 39. 15

New York Times Co. v. Sullivan
376 U.S. 254, 84 S.Ct. 710,
41 L.Ed.2d 686 (1964). 13, 29

Ohio Casualty Insurance Company v. Downey
Savings and Loan Association (1988)
No. 87-159, *cert. denied* 108 S.Ct. 2023
(case below, 189 Cal.App.3d 1072). 3

People ex rel. Dep't. of Public Works
v. Mascotti (1962)
206 Cal.App.2d 772, 23 Cal.Rptr. 846. 17

Playtex Holdings, Inc. v. O'Gilvie (1988)
87-1021, 108 S.Ct. 2014 (case below,
609 F.Supp. 817, 821 F.2d 1438). 3

Preston v. Municipal Court (1961)
188 Cal.App.2d 76 9

Ramsey Associates Inc. v. Coty (1988)
cert. denied 108 S.Ct. 2903 3

Simmons v. So. Pac. Trans. Co. (1976)
62 Cal.App.3d 341, 133 Cal.Rptr. 42 . . . . . 24, 30

Page

Smith v. Wade (1983)
461 U.S. 30, 103 S.Ct. 1625
75 L.Ed.2d 632 . . . . . 5, 23, 28

Socialist Labor Party v. Gilligan
406 U.S. 583 (1972) 14

Webb v. Webb
451 U.S. 493 (1981) 9, 10

Weirum v. RKO General Inc. (1975)
15 Cal.3d 40 7

Yakus v. United States
321 U.S. 414 (1944) 10

Yarrow v. State of California (1960)
53 Cal.2d 427, 2 Cal.Rptr. 137 20

Zuckerman v. Underwriters at Lloyd's London (1954)
42 Cal.2d 460 8

Constitutions

California Constitution
Article I, sections 7 and 17 . . . . . 16, 17

United States Constitution
First Amendment 29-30
Eighth Amendment 4, 29
Fourteenth Amendment 29

Page

Rules

California Rules of Court:
Rule 977(a)(1)-(2) 15

Federal Statutes

42 U.S.C. § 1983 . . . . . 24, 28

State Statutes

California Civil Code:
§ 48a(4)(d) 13
§ 1787.3 13
§ 1812.31 13
§ 3294 . . . . . 12, 13
§ 3294(a) 13
§ 3294(c)(1) 13
§ 3294(e) 13
§ 3295 . . . . . 12, 13
§ 3295(d) 13
§ 3295(f) 13

California Code of Civil Procedure:
§ 425.13 13
§ 662.5 20

California Penal Code:
§ 520 27
§ 12022.6 27

Page

Texts

California Book of Approved Jury Instructions, Civil, 7th Ed., West Publishing Co. (1986), Instruction 14.71, "Punitive Damages - Recovery and Measure." 7

16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* (1977) §4022 10

Peterson, Sarma & Shanley, Punitive Damages: *Empirical Findings*, Rand Corp. Institute For Civil Justice Report No. R-3311-ICJ (1987) 5

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATEMENT OF THE CASE

During the 1960's, Paul Winchell,[1] the famed ventriloquist, television pioneer, and medical inventor, coproduced with Metromedia, Inc., approximately 300 television shows known as "Winchell-Mahoney Time." (R.T. p. 295.) Being the first videotaped, and thus preservable, product of Mr. Winchell's long career, these shows were designed to provide future economic security through syndication (R.T. p. 295). Pursuant to a 1965 agreement, the parties created a joint venture with respect to syndication, with each party having equal rights to syndicate and with the profits to be split 50-50 (C.T. p. 1906). As a result of the termination of a subsequent agreement (the 1968 contract, C.T. p. 1915), Metromedia lost its right to syndicate the shows and gave up any rights to erase the tapes of the show. It then attempted to wrest Winchell's syndication rights away from him. Metromedia gave Winchell an "ultimatum" to sign a contract, by a specified date, giving up most of his rights and transferring them back to Metromedia, or Metromedia would destroy all 300 videotapes and all copies in the hands of syndicators (C.T. pp. 2000, 1982, 2015 and 1973). Winchell refused to give up his syndication rights. In a shocking act of unbridled arrogance and spite, Metromedia retaliated by running all of the tapes through a degausser and dumping them into the trash (R.T. pp. 1249, 1254-1255). The entire "Winchell-Mahoney Time" series is now lost forever to all future generations of parents and children — and to Mr. Winchell and his family.

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[1] Respondent April Enterprises, Inc., is the wholly owned personal services corporation of Mr. Winchell, and has no subsidiaries or affiliates.

The plaintiff established direct evidence of malice and intent to injure through the testimony of Vice President Richard Woollen of Metromedia. He testified that, at the time Metromedia was threatening Winchell, it had no right to syndicate but was going to extract that right from its co-venturer. He testified that, because Mr. Winchell refused to give up his rights, Metromedia destroyed the tapes "to show him" — "if the man doesn't agree - we erase the tapes." He testified that he showed Mr. Winchell that he meant what he said — and that Metromedia did it "so he'd never be able to go forward with his syndication."[2]

The jury found the defendant breached its fiduciary duty to the plaintiff and awarded compensatory damages of $3,800,000 for destruction of the tapes and of the plaintiff's syndication and residual rights, *and slightly more than treble damages*, or $14,000,000 as punitive damages.

The case was filed twelve years ago, in 1976, was tried twice, and went up and down the California judicial hierarchy twice.[3]

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2 The relevant excerpts from the Reporter's Transcript of Mr. Woollen's testimony (one-and-a-half pages in length) are attached as Appendix A.

3 This case preceded the filing of the original complaint in *Aetna Life Insurance Company v. Lavoie*, 505 So.2d 1050 at 1052 (Ala. 1987) by over two years.

REASONS FOR DENYING THE WRIT

A. THE *BANKERS LIFE* PRUDENTIAL CONCERNS AND DESIRE NOT TO SHORT-CIRCUIT "A NUMBER OF LESS INTRUSIVE, AND POSSIBLY MORE APPROPRIATE, RESOLUTIONS" OF THESE "FAR-REACHING" ISSUES, WOULD BECOME WHOLLY ILLUSORY IF THE COURT PUT A SIX-MONTH TIME LIMIT ON ITS INVITATION.

The Court recently eschewed a direct resolution of the issues presented here (*i.e.*, the constitutionality of punitive damages) in *Bankers Life and Casualty Co. v. Crenshaw*, 108 S.Ct. 1645 (1988), leaving those issues for initial resolution by the state supreme courts and legislatures.[4]

The Court's reluctance to resolve the issue in *Bankers Life* was substantially based on the avoidance of short-circuiting three "less intrusive, and possibly more appropriate, resolutions": (1) the possibility of state legislatures enacting punitive damage legislation; (2) the possibility of state courts resolving the issue on state constitutional grounds; and (3) "a

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[4] Two weeks later the Court denied petitions for certiorari, or dismissed appeals, in six other cases presenting the same issues. *See Mobile Dodge, Inc. v. Alford*, No. 86-107, *cert. denied* 108 S.Ct. 2008 (case below, 487 So.2d 866); *Ohio Casualty Insurance Company v. Downey Savings and Loan Association*, No. 87-159, *cert. denied* 108 S.Ct. 2023 (case below, 189 Cal.App.3d 1072); *Atlantic Richfield Company v. Nielsen*, No. 87-1196, *cert. denied* 108 S.Ct. 2023; *Aluminum Company of America v. Sliman*, No. 86-1569, *cert. denied* 108 S.Ct. 2013 (case below, 112 Idaho 277); *John Hancock Variable Life Ins. Co. v. Pierce*, No. 87-1535, *cert. denied* 108 S.Ct. 2015 (Supreme Court of Alabama Opinion); and *Playtex Holdings, Inc. v. O'Gilvie*, 87-1021, 108 S.Ct. 2014 (case below, 609 F.Supp. 817, 821 F.2d 1438).

Then finally, on June 30, 1988, the Court denied a petition for certiorari in *Ramsey Associates Inc. v. Coty*, *cert. denied* 108 S.Ct. 2903.

well-developed record and a reasoned opinion on the merits" by the state supreme court deciding the question of federal law in the first instance.

The granting of certiorari in this case, *six short months after Bankers Life*, would every bit as much "short-circuit" each one of these "less intrusive, and possibly more appropriate resolutions." None of the possibilities envisioned by the Court have even remotely materialized in the instant record. As will be demonstrated below, the Court's concern for "comity to the States, and . . . a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal," (108 S.Ct. 1651) has not been resolved, nor could possibly have been resolved, in the six short months since *Bankers Life*. The recent round of petitions filed by counsel for Metromedia and others is prudentially premature.[5] The state legislatures, state courts and state supreme courts all realize, as did this Court, that these issues are complex, extremely serious and far-reaching. Those bodies need time to respond. The issues are not going to be, and should not be, resolved on an ad hoc basis in a short period of time.

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[5] The petition in *Nationwide Mutual Ins. Co. v. Clay*, No. 88-57, being filed on July 27, 1988, affords even less time (*i.e.*, two months) for such resolutions — and involves substantial issues unrelated to the constitutionality of punitive awards, thereby rendering it less than the ideal or "appropriate" setting. Similarly, the constitutional issues in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-____, *pet. for cert. filed Sept. 1988, and Goodyear Tire & Rubber Co. v. Hodder, No. 88-____, pet. for cert. filed Oct. 14, 1988, as in Bankers Life* and here, were not properly preserved.

Moreover, in *Browning-Ferris*, only the Eighth Amendment issue is advanced in the Petition for Certiorari, and, in *Hodder*, the award was substantially reduced after being subjected to appellate review ("[I]t is because of the unique, public aspect of punitive damages that the court exercises a much closer supervision over these awards than is the case with compensatory awards." (*Hodder v. Goodyear Tire and Rubber Co.*, 426 N.W.2d 826 (Minn. 1988)).

How could the "less intrusive, and possibly more appropriate, resolutions," which the Court wanted not to foreclose, have possibly materialized in six months? On May 16, 1988, the Court issued its decision in *Bankers Life*. Now, in October, the same counsel who represented the defendant and Petitioner in *Bankers Life*,[6] is overanxiously asking the Court, in effect, to reverse itself by simply ignoring the prudential concerns which were at the heart of the decision.[7] This "hair-trigger" response results in exactly what the Court wanted to avoid, *i.e.*, foreclosure of other, "less intrusive, and possibly more appropriate, resolutions."

Petitioner demonstrates little respect for the delicate balance between the federal and state levels of government[8]

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6 Gibson, Dunn & Crutcher and Messrs. Olson and Simms are also counsel for petitioner in *The Goodyear Tire and Rubber Co. v. Hodder*, No. 88-____, pet. for cert. filed October 14, 1988, and have strategically timed matters so that their petitions for certiorari on both cases were filed on the same day. Thus, the instant petition predictably concludes with a footnote encouraging the Court to treat the cases as "twins" and to set this case "for argument in tandem" with *Hodder* (Petition, p. 22).

It should also be noted that Petitioner's attempt to find comfort in the docketing of another California case, *CNA Casualty Co. of California v. Rouhe*, No. 88-297, pet. for cert. filed, August 18, 1988, "in which several of these questions are presented" (Petition, p. 17, n. 7) is misplaced. The *Rouhe* case was settled without any opposition being filed and was voluntarily dismissed.

7 Petitioner's attempt to argue that the state courts and state legislatures were expected to stand up and jump into action when the Court noted probable jurisdiction in *Bankers Life* (a decision with which even this Court eventually disagreed) or issued its opinion in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (in which the issue was expressly *not* decided), is both fanciful and tortured (Petition, p. 16). The first time these prudential concerns and nonfederal possibilities were expressed was six months ago in *Bankers Life*.

8 "When federal courts enforce punitive damage awards against local officials they intrude into sensitive areas of sovereignty of coordinate branches of our Nation, thus implicating the most basic values of our system of federalism." *Smith v. Wade*, 103 S.Ct. 1625 at 1658, 461 U.S. 30 (continued)

by placing a six-month time limit on the commencement, maintenance and conclusion of non-federal resolutions, the development of which this Court expressly elected to allow. The issues are vital and significant to the civil litigation systems of 45 of the 50 states. (See Peterson, Sarma & Shanley, *Punitive Damages: Empirical Findings*, 1 n.1, Rand Corp. Institute For Civil Justice Report No. R-3311-ICJ (1987).) In other words, the Court's invitation to the state legislatures and courts to address and resolve these "far-reaching" issues would be rendered illusory if the Court were willing to only wait six months for a definitive response. *Bankers Life* would then become the equivalent of Justice Robert Jackson's "munificent bequest in a pauper's will."

B. METROMEDIA NOT ONLY FAILED TO PRESERVE ITS PRESENT CHALLENGES TO PUNITIVE DAMAGES BY NOT RAISING THEM PRIOR TO VERDICT, BUT ELECTED TO WAIVE THEM UNDER CALIFORNIA LAW BY AFFIRMATIVELY REQUESTING THE TRIAL COURT TO INSTRUCT THE JURY REGARDING THE RECOVERY OF PUNITIVE DAMAGES AND TO DECIDE THE ISSUE BY A PREPONDERANCE OF THE EVIDENCE.

1. Waiver

Metromedia not only failed to preserve its constitutional challenges now raised against the punitive damages, *it was Metromedia itself who requested that the jury be instructed on punitive damages!* It specifically requested the trial court to give the jury a plenary instruction with respect to the

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(ftn. continued)
at 92 (Justice Rehnquist, dissenting).

recovery of punitive damages (Defendant's Requested Jury Instruction No. 85; C.T. pp. 1018-1020, attached hereto as Appendix D).

This instruction, absent a parenthetical sentence tagged on at the end and deleted by the trial court as lacking in evidentiary support, was in fact given to the jury (Instruction No. 67; C.T. p. 1227). Moreover, the instruction, with routine adaptions, came straight out of the California Book of Approved Jury Instructions, Civil, 7th Ed., West Publishing Co. (1986), Instruction 14.71, "Punitive Damages - Recovery and Measure."

Additionally, Metromedia is in no position to contend that its procedural due process rights were violated by having the punitive damage issue decided by a preponderance of the evidence instead of some heightened standard of proof, such as "clear and convincing" evidence. Although Metromedia successfully convinced the trial court to have the jury decide the "superseded contract" issue by "clear and convincing evidence" (see Appendix E), *it was Petitioner who insisted that the punitive damage issue be decided by a "preponderance of the evidence"* (see Appendix D). Thus, any procedural due process infirmity rests at the feet of Petitioner itself. *It* asked the trial court to instruct on punitive damages. *It* asked the trial court to instruct the jury on preponderance of the evidence.

California law on this point is clear, decisive and fatal to Metromedia's attempt to raise the issue of the constitutionality of punitive damages.

> "It is well settled that a party cannot attack the substance of an instruction if he himself proposed similar instructions." *Weirum v. RKO General Inc.* (1975) 15 Cal.3d 40, 50.

Also see Zuckerman v. Underwriters at Lloyd's London (1954) 42 Cal.2d 460.[9]

Whatever procedural due process protections Petitioner wanted, it could have set forth in its jury instructions or made some other request of the court. Given the egregious facts in evidence, the plaintiff may not have even objected. Petitioner cannot now complain of the denial of safeguards which it never requested or as to which it guided the court in the opposite direction. The constitutional "afterthought" simply did not occur to Metromedia until the trial was over.

Petitioner argues that the substance of the instruction did not address its (then unannounced) constitutional challenges because "juries do not decide issues of law, much less issues of constitutional law" (Petition, p. 9). Yes — but courts do. Whatever safeguards it wanted, it should have asked for. Instead, it asked for "preponderance of the evidence" and now wants this Court to reverse the judgment because "clear and convincing" was not used.

2. Failure To Raise The Issue Prior To Verdict

The flaw which proved to be fatal in *Bankers Life* is also present here, *i.e.*, the issue was not timely preserved. California courts have repeatedly observed that:

> "[t]he right to question the constitutionality of a statute may be waived. It is a general rule applicable

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9 Petitioner cannot argue that the trial court had already ruled that it was going to instruct on punitive damages and Petitioner was merely trying to get the best instruction it could. Metromedia's request for Instruction No. 85 was prepared on June 16, 1986 (C.T. p. 922) and was filed with the court on June 23, 1986. This was *well before* the trial court made any ruling as to whether it was going to allow the jury to decide punitive damages. Instructions were preliminarily discussed on June 25, 1986 (R.T. pp. 2076 *et seq.*) and the court ruled on the instructions on June 26, 1986 (R.T. pp. 2156 *et seq.*).

> in civil case that a constitutional question must be raised *at the earliest opportunity or it will be considered as waived.* [Citation.]" *Hershey v. Reclamation District No. 108* (1927) 200 Cal. 550; Also see *Bidart Bros. v. Elmo Farming Co.* (1974) 35 Cal.3d 248, and *Preston v. Municipal Court* (1961) 188 Cal.App.2d 76. (Emphasis added.)

Here, Petitioner first raised the constitutional questions only *after* the trial was over, the verdict was in, it's liability had been determined, and it had filed its motion for new trial and plaintiff had responded. Again, the constitutional issues were an "afterthought," in response to the *Bankers Life* filings. They were not raised in any of defendant's answers; were not raised during the entire course of the first appeal; were not raised in any of defendant's three trial briefs; and were not raised in its post-trial motions. The first time that Metromedia ever *mentioned* the issue was in its reply brief in response to plaintiff's opposition to its post-trial motions and opposition to plaintiff's post-trial motion to amend to conform to proof — *ten years after the litigation commenced.*

The case proceeded to trial, and the jury heard all the evidence and Petitioner never claimed any of the constitutional rights now asserted. Not only did Petitioner not request jury instructions, or otherwise inform the court, with respect to the constitutional issues it now raises, it affirmatively asked for the punitive damage instruction given to the jury — including the preponderance of the evidence standard of proof. Petitioner kept to itself its constitutional claim *in order to gamble on the verdict* and get two bites of the apple.

The law is clear that a litigant may not suppress its claim of constitutional rights until a trial is over and then — dissatisfied with the verdict — assert such claims in an attempt to force a time-consuming and expensive repetition of the proceedings. There is no jurisdiction under these circumstances. Thus, in *Webb v. Webb*, 451 U.S. 493 (1981),

this Court had before it a Writ of Certiorari from the Georgia Supreme Court. This court dismissed the writ:

> *"We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court.* This court has frequently stated that when 'the highest state court has failed to pass upon a federal question, *it will be assumed that the omission was due to want of proper presentation in the state courts* unless the aggrieved party in this Court can affirmatively show the contrary.' [Citations.]" 451 U.S. 495-496. (Emphasis added.) (*See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, fn.3 (1983)).

Petitioner's claim of a federal constitutional issue, first presented after filing its motion for new trial, is untimely. "Ordinarily, the federal issue is presented too late if it is first raised in a motion for new trial." 16 Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure* (1977), section 4022, p. 701. This court has so held in *Barbour v. State of Georgia*, 249 U.S. 454, 460 (1919), a decision which was cited with approval in *Yakus v. United States*, 321 U.S. 414, 444 (1944) and has never been disapproved or overruled.

The reason for the rule requiring that federal issues be timely presented to the state court confirms that Petitioner's failure to do so is fatal to its claim of jurisdiction. As this court stated in *Webb v. Webb, surpa*, the requirement of timely preservation affords the parties the opportunity "to develop the record necessary for adjudicating the issue"; it permits the state courts to exercise their authority to construe state statutes so as to avoid or obviate federal constitutional challenges; insures that if there are independent and adequate state grounds that would determine the federal issue they will be identified and acted upon in an authoritative manner and allows state tribunals to adjudicate the federal claims, which

may thereby "obviate any reason" for this court to give "plenary consideration to the case." 451 U.S. at 500.

Similarly, in *Illinois v. Gates*, 462 U.S. 213 (1983), this court refused to consider a constitutional claim not pressed or passed upon in the state court, noting that questions not raised below are those on which the record is very likely to be inadequate since it was not compiled with the constitutional questions in mind. 462 U.S. at 221.

For whatever tactical reasons it chose to employ, Petitioner defended this action for ten years and went through the second trial of the action without ever raising its constitutional questions. The absence, here, of a "well-developed record and reasoned opinion on the merits" is the direct product of Petitioner's decision not to assert the issue until its liability had first been determined.

C. THIS CASE IS THE ANTITHESIS OF THE "APPROPRIATE SETTING" FOR RESOLUTION OF THESE "FAR-REACHING" ISSUES.

The present record, even more so than *Bankers Life* and its seven, aborted progeny, does not even come close to matching any reasonable criteria for the ideal or "appropriate" case. None of the prudential concerns expressed in *Bankers Life* have been resolved.

1. Not Only Has The California Legislature Not Had The Opportunity To Address The Issue, But, Eight Months Prior To *Bankers Life*, And Two Years Subsequent To The Trial Of This Case, It Revamped And Restricted The Law Of Punitive Damages, Thereby Rendering This Case Of Historical Interest Only To The Court.

In September of 1987, the Governor of California signed into law a series of amendments to California Civil Code sections 3294 and 3295, revamping and restricting punitive damage law. Petitioner somehow argues that this was a legislative response (and supposedly an insufficient one) to *Bankers Life*. Such a conclusion is difficult to reconcile with the fact that *Bankers Life* was not decided until *eight months after* these amendments were passed. It would be unfair, and certainly unrealistic, to conclude, as does Petitioner, that the new California punitive damage laws, enacted in September of 1987, were in response to this Court noting probable jurisdiction in *Bankers Life* in March of 1988. (Petition, p. 16.)

Moreover, it would be especially inappropriate to short-circuit the California legislature on this issue. The California legislature has a demonstrated willingness to address such issues. It is one of the most active legislatures in the nation with respect to enacting statutes regulating punitive damages. California is one of eight states which relies upon statutory law, as opposed to common law, for punitive damages. This Court in *Bankers Life*, in expressly granting the state legislatures the opportunity to statutorily address punitive damage issues, cited California Civil Code section 1787.3 as an example. Attached hereto as Appendix B is a compilation of no less than *thirty (30) California statutes regulating punitive damages*, and enacted at various times

from 1872 through 1987.[10] Indeed, California has enacted a media defamation statute which goes beyond *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 41 L.Ed.2d 686 (1964), and requires proof that the defendant harbored "that state of mind arising from hatred or ill will toward the plaintiff." Civil Code section 48a(4)(d).

More importantly, the recent statutory revisions to the California law of punitive damages[11] *cannot even be reviewed by the Court in this case.* The new law has no application whatsoever to this action. These amendments expressly "apply to all actions in which the initial trial has not commenced prior to *January 1, 1988*" (§ 3294(e) and § 3295(f)). The present action *was tried in 1986.* Thus, granting certiorari in this case would serve to affect only the present litigants, and those with California judgments entered before January 1, 1988. Claims for punitive damages in California are now entirely governed by the new, revised and stricter amendments to sections 3294 and 3295.[12]

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10 Two of these statutes limit the award to specific amounts not to exceed 1% of the defendant's worth (Civil Code §§ 1787.3 and 1812.31). If the legislature, given the opportunity, had in fact placed a 1% limit on *all* punitive awards, it would not have made any difference here, in that the punitive award was 1/2 of 1% of the defendant's worth (or one week of net income).

11 Pursuant to the 1987 amendments to Civil Code sections 3294 and 3295, entitlement to punitive damages must be "proven by clear and convincing evidence" (§ 3294(a)); malice must be demonstrated by "despicable conduct" and "willful and conscious disregard of the rights or safety of others" (§ 3294(c)(1)); oppression now means "despicable conduct"; no evidence of the defendant's financial condition is admissible until the trier of fact first determines that the defendant was guilty of malice, fraud or oppression, *i.e.*, separate trials are now required (§ 3295(d)); and, punitive damages may not be plead against a health care provider without prior court approval (Code of Civil Procedure § 425.13).

12 This Court has previously expressed its reluctance to pass on the constitutionality of a state statute which has been subsequently amended. *See Hall v. Beals*, 396 U.S. 45 (1969) (action to invalidate residency requirement in voting statute, subsequently amended, dismissed as moot);

(continued)

Thus, the present case is multiply premature. The California legislature extensively revised the state punitive damage laws but did so prior to May of 1988 and, therefore, had no opportunity to exercise the option expressed in *Bankers Life*. Moreover, the new California punitive damage laws are inapplicable to this case as it was tried prior to their enactment. It would be difficult to imagine a more inappropriate setting for the resolution of these "far-reaching issues."

2. The California Supreme Court Issued No Opinion Whatsoever, Let Alone A "Well-Developed Record and Reasoned Opinion On The Merits," And The Intermediate Court Of Appeal Opinion Was Unpublished And Devoted But Three Sentences To Rejecting The "Procedural Due Process" Challenge Only.

As the California Supreme Court denied Metromedia's petition for review, it neither heard nor decided any issue in the case — let alone the constitutional challenges to the punitive damage award.[13] Thus, this Court does not have a "reasoned opinion on the merits" from the California Supreme Court. Again, six months is simply an insufficient amount of time to expect the state supreme courts to respond

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(ftn. continued)
and *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972) (appeal of action challenging election laws which were extensively revised after commencement of the suit, dismissed).

[13] The California Supreme Court may well have granted review and given Petitioner, as well as this Court, a "well developed record and a reasoned opinion on the merits" if Metromedia had not waived its challenge by requesting the punitive damage instruction itself. (See discussion under Point 4 herein.) Respondent strenuously argued to the state supreme court that Petitioner had waived the issue under California law by requesting the instruction. The Court responded by denying review.

to *Bankers Life* with a "reasoned opinion on the merits."

The decision of the intermediate Court of Appeal in California is of no greater assistance. The opinion was ordered unpublished *and was not ever intended to serve as legal precedent.*[14] In any event, the *entirety* of that section of the California Court of Appeal opinion dealing with the issue is a mere three sentences, summarily rejecting the procedural due process claim only (see Petition, p. 8, and Appendix A thereto, 27a). There is no discussion whatsoever of the substantive due process or excessive fines claims.[15]

Can Petitioner seriously contend that the Court has "gain[ed] the benefit of a well-developed record and a reasoned opinion on the merits?" Such a record and such an opinion will surely be presented to this Court — but not within six months of the *Bankers Life* decision.

3. Although The California Supreme Court Has Stricken Down Civil Fines Under The Excessive Fines And Due Process Provisions Of The State Constitution, Metromedia Elected Not To Press The State Constitutional Grounds In The State Courts.

As will be discussed in greater detail below, Petitioner defended this litigation for *ten years* without the slightest hint of a constitutional challenge. It was clearly an afterthought spawned by the contemporaneous flurry of activity

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[14] Under California Rules of Court, Rule 977(a)(1)-(2), an unpublished opinion "shall not be cited by a court or party" and therefore cannot serve as precedent. *Nelson v. Justice Court* (1978) 86 Cal.App.3d 64, 66, 150 Cal.Rptr. 39, 41.

[15] The oral argument before the California Court of Appeal was heard on May 1, 1988 — one week before the opinion in *Bankers Life* was issued. No further briefing was done. Again, the Court of Appeal opinion was, in no way, a response (or failure to respond, for that matter) to *Bankers Life*.

by the Washington, D.C., office of Metromedia's counsel in *Bankers Life*. Even at that late date, Metromedia elected to press only *federal* grounds. This election is ironic indeed in light of not only the existence of both an excessive fines and a due process clause in the California Constitution (Article I, section 17, and Article I, section 7, respectively), but the proven willingness of the California Supreme Court to strike down civil fines as in violation of *both* provisions. In *Hale v. Morgan* (1978) 22 Cal.3d 388, 584 P.2d 512, a suit was brought by a tenant for a $100 per day statutory penalty, amounting to $17,300 against an unsophisticated cable television installer, imposable upon a landlord who shuts off a tenant's utility services. A unanimous California Supreme Court struck down the fine[16] as excessive under the excessive fines and due process provisions[17] of the state constitution. However, the Court expressly rejected the defendant's contention that the fine also violated the equal protection clause of the state constitution.

Here, Metromedia's *only* reference to the state constitution in its opening brief to the Court of Appeal was a passing mention of the *equal protection* clause of Article I, section 7 ("The exposure to open-ended damages, . . . violated Metromedia's right to *equal protection* under the fourteenth amendment, as well as California Constitution Article I, § 7," [see Appendix G, p. 47a, to Petition; (emphasis added)]. The excessive fines and due process provisions of the state constitution were not even mentioned. *All* constitutional

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16 The fine in that particular case, as a result of which the tenant "may well end up owning the [mobile home] park or a substantial equity therein" (22 Cal.3d at 405), was held invalid — not the statute. The "courts evaluate the propriety of the sanction on a case-by-case basis." (22 Cal.3d at 404.)

17 In part, the Court reasoned that due process was violated because "No discretion is permitted the trier of fact" (22 Cal.3d at 399). Here, Petitioner advances the opposite argument.

challenges were deleted from Metromedia's Reply Brief. Similarly, in Metromedia's Petition for Review filed before the California Supreme Court (see Appendix C hereto), it states only, and inaccurately, that "Petitioner *has* pursued under the United States Constitution and its California counterparts (Art. I, § 7(a); Art. I, § 17) the same constitutional questions in this case which have now twice been labeled 'important' by the United States Supreme Court" (emphasis added) — with the only antecedent reference in Appellant's Opening Brief to the Court of Appeal below being *to the equal protection clause.*[18] Nowhere in Metromedia's presentation to the state supreme court is there any discussion of the state due process or excessive fines claims or even a mention of *Hale v. Morgan.*

Metromedia simply did not provide the California appellate and supreme courts with the opportunity "to resolve the issue" by relying on the state constitution.

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[18] Metromedia's position before this Court is not in any way enhanced by its petition for rehearing. It is well established under California law that reviewing courts will not grant rehearings on points raised for the first time in a petition for rehearing. *People ex rel. Dep't. of Public Works v. Mascotti* (1962) 206 Cal.App.2d 772, 23 Cal.Rptr. 846; *Blackman v. MacCoy* (1959) 169 Cal.App.2d 873, 881, 339 P.2d 169. Moreover, Metromedia's statement, in its petition for rehearing, that it had "explicitly argued" the due process and excessive fines provisions of the state constitution, citing pages 49-50 of its Appellant's Opening Brief, is simply inaccurate (see App. J to Petition, 55a-56a). The *only* reference to state constitutional provisions in the Opening Brief was to *equal protection.*

4. California Punitive Damage Law Provides For Well-Defined Definitions Of Proscribed Conduct, Specific And Proportional Criteria On Which The Amount Of The Award Must Be Based, And Extremely Strict Review By The Trial And Reviewing Courts — In Theory And In Practice.

In her separate concurrence in *Bankers Life*, Justice O'Connor, in reference to Mississippi law, stated, "This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process" (108 S.Ct. at 1656). In stark contrast to the law of some other states, California does not grant "wholly standardless discretion" at any level of the judicial process. California defendants are afforded significant and substantial protections and guarantees — in theory and in practice.

(a) Only 9% Of The Punitive Damage Dollars Awarded In California Survive Judicial Review.

Are the due process rights of defendants routinely denied under the California law of punitive damages? Are California defendants subjected to "wholly standardless discretion"? Attached hereto as Appendix F is a fairly exhaustive chart of available opinions of the California Courts of Appeal and Supreme Court, decided between 1922 and 1986, in which the excessiveness of a punitive award was examined. The amount of the award, and how it was treated by the trial and reviewing courts, is analyzed for each of 71 cases. Before this Court decides to grant certiorari and use this case as a vehicle to examine the federal constitutional implications of such awards, Respondent respectfully urges the Court to carefully examine this chart. Such empirical analysis definitely dispels the wholly unsupported and pejorative notion that, in California, the substantive and due process rights of punitive damage defendants are left unchecked.

Whatever may be said of other jurisdictions, the California judiciary is fully empowered — indeed, mandated — to keep a tight rein on such awards. Rigorous standards have produced restrained results.

Out of all 71 cases, in 42 (or *60%*), the courts have ordered the punitive award to be either reduced or reversed. Out of the 23 cases involving awards of $500,000 or more, 18 (or *78%*) have been reduced or reversed. Out of the 19 cases involving awards of one million dollars or more, 16 (or *85%*) have been reversed or remanded. Out of the total dollar amount of all 71 punitive awards, *91%* have been judicially excised, *leaving only 9% to serve as the basis of a final judgment against the defendant.*

(b) California Trial Courts, On Motions For New Trial, Sit As "Independent Triers Of Fact," And Are Mandated To Reweigh The Evidence And To Review Jury-Decided, Punitive Awards.

In *Bankers Life*, Justice O'Connor observed that, under Mississippi law, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury" (108 S.Ct. at 1656, quoting the opinion below). *This is not the law in California.*

> "[T]he trial court, in ruling on the [new trial] motion, sits not in an appellate capacity but as an independent trier of fact." *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 933, 148 Cal.Rptr. 389, 402.
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> "The trial judge not only has the discretion to grant a new trial on the ground of excessive damages, but it is his duty to do so, or to provide for a reduction of the verdict, if under the evidence he believes it to be too large. . . .
>
> "As heretofore indicated the 1967 amendments to Code of Civil Procedure, section 657 eliminated the words 'appearing to have been given under the influence of passion or prejudice' as part of the stated

ground for granting a new trial for excessive damages. . . .

"[I]t is the exclusive province of the trial court to judge the credibility of the witnesses, to determine the probative force of testimony and to weigh the evidence, and it may draw reasonable inferences therefrom opposed to those drawn by the trier of fact at the trial." (Quoting *Yarrow v. State of California*, 53 Cal.2d 427, 434, 2 Cal.Rptr. 137.) *Collins v. Lucky Markets, Inc.* (1969) 274 Cal.App.2d 645, 79 Cal.Rptr. 454.

California Code of Civil Procedure section 662.5 provides for the trial court to issue a remittitur "of so much [of the verdict] as the court *in its independent judgment determines from the evidence to be fair and reasonable*" (emphasis added). *Also see Neal v. Farmers Ins. Exch., supra.*

"It has been repeatedly held that after a jury award of exemplary damages, it becomes the province of the trial court on motion for new trial to say whether the amount is excessive." *Ferraro v. Pacific Finance Corp.* (1970) 8 Cal.App.3d 339, 351, 87 Cal.Rptr. 226, 233.

Thus, California law is on the opposite end of the spectrum from the "sole discretion in the jury" standard of Mississippi.

(c) California Appellate Review of Punitive Awards Is Equally Strict.

The appellate decisions compiled and analyzed in Appendix A are resplendent testimony to the rigorous supervision by the California reviewing courts with respect to punitive awards.

(d) California Law Imposes Multiple And Well-Defined Standards Of Proportionality, Which The Trier of Fact, Trial Court and Reviewing Courts Are Obligated To Apply.

During oral argument in *Bankers Life*, Justice Scalia asked counsel for plaintiff and respondent whether a criminal statute would be constitutional (presumably under the due process clause) if the fine were jury-determined and limited only by: (1) "it shall not shock the judicial conscience," (2) "it shall not deprive the defendant of a livelihood," and (3) "it shall not be disproportionate to the offense" (Transcript, Monday, November 30, 1987, p. 40). That question would never have to be asked under California law.[19]

> "In making the indicated assessment we are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citations] Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionately high amount of punitive damages if the actual harm suffered thereby is small. [Citation.] Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served

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19 In *Nationwide Mutual Ins. Co. v. Clay*, No. 88-57, petition for cert. filed July 27, 1988, the petitioner first notes that Alabama law allows juries to be given "no instruction as to standards for imposing punitive damages," and seeks review by this Court, arguing that "Due Process requires that actual and punitive damages bear a reasonable relation to each other." (Petition, pp. 5 and 9). Such proportionality *is* required under California law. The punitive/actual damage ratio in *Clay* was 25 to 1. Here, it was 3.5 to 1.

> by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." *Neal v. Farmers Ins. Exch., supra* (1978) 21 Cal.3d 910, 928, 148 Cal.Rptr. 389.

The jury here was so instructed. The trial court and reviewing courts were so guided.

(e) The Award Here Was Constitutionally Proportional To The Compensatory Damages (*i.e.*, Treble), The Defendant's Ability To Pay (*i.e.*, One Week Of Net Income), And The Defendant's Conduct (*i.e.*, Actual Malice).

The punitive award in *Bankers Life* was eighty (80) times the compensatory damages. The punitive award here was 3-1/2 times the compensatory damages of $3,800,000. Even if the Court determined to place some sort of rigid "constitutional" cap on punitive damages, through the due process or excessive fines clauses, and adopted the "treble damages" argument advanced by some critics (and the petitioner in *Browning-Ferris, supra*), the present judgment would be squarely in the ballpark, *i.e.*, 3-1/2 times the actual damage.

The 14 million dollar punitive award was based on the 1985 assets of the defendant of 2.5 billion dollars and is equivalent to one week of defendant's net income.

The conduct of the defendant, as a factor to which the amount of punitive damages must be proportional, is of a character and nature similar to no other punitive damage case which has sought this Court's attention. This is not a judgment based on a disputed insurance claim or a defective product. The facts established *direct evidence* of actual malice and fraud on the part of Metromedia. Metromedia harbored an intent to injure April and acted out of spite. According to its Vice President, at a time when it had no right to syndicate and was trying to wrest such rights from April, Metromedia gave April an "ultimatum" to sign an oppressive deal or have the tapes erased "so that he'd never

be able to go forward with his syndication," and then destroyed the tapes "to show him." Metromedia was a fiduciary and a trustee with respect to April. The trier of fact, the trial court, and the court of appeal found malice. The state supreme court refused to alter these factual findings.

Metromedia based its threats to erase the tapes unless April gave up its newly-reacquired syndication rights, upon a representation that it needed to re-use "this expensive stock." This was a fraud. Metromedia's Vice President Anderson admitted, consistent with internal memos, that at the time of Metromedia's representations to April, the tape had *no value* for re-use (R.T. p. 1465; Ex. 39; C.T. p. 2014). The trier of fact, the trial court, and the court of appeal found fraud. The state supreme court refused to alter this factual finding.[20]

Thus, even if the Court chose to regulate state punitive awards by application of due process standards, the present judgment would pass muster.

5. In California, Evil Motive Is The Centrai Element Of Malice And Is Not Established By Conduct Which Is Unreasonable, Negligent, Grossly Negligent Or Reckless.

In *Smith v. Wade*, 461 U.S. 30, 48 (1983), 103 S.Ct. 1625, 1636, 75 L.Ed.2d 632, this Court observed that most cases under state common law permit punitive damages based on "recklessness, . . . or even gross negligence."[21] Not so in

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20 It is simply not fair for Petitioner to characterize the facts in some manner more favorable to it — or in any manner other than what was determined by the state court proceedings. It is a familiar rule that once a case is otherwise before this Court, the Court generally will not reexamine the state court's findings and conclusions of fact. *Grayson v. Harris*, 267 U.S. 352, 358 (1925).

21 Indeed, the majority itself in *Smith v. Wade* rejected the position of the dissent that punitive damages should only be available for a violation of 42

(continued)

California.

> '*Animus malus* or evil motive, . . . is the central element of the malice which justifies an exemplary award. [Citation.]" . . .
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> "[S]ection 3294 views evil motive as the central essential factor in the malice which justifies an exemplary award. That factor calls upon the jury to assess the defendant's actual state of mind; it is not satisfied by characterizing his conduct as unreasonable, negligent, grossly negligent or reckless. [Citation.]" *G.D. Searle & Co. v. Superior Court of Sacramento* (1975) 49 Cal.App.3d 22, 30-31, 122 Cal.Rptr. 218, 223-224.
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> "Malice as used in Civil Code section 3294 means malice in fact, not malice in law. [Citation.] 'There must be an intent to vex, annoy or injure. Mere . . . negligence, even gross negligence is not sufficient to justify an award of punitive damages' (quoting *Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894, 99 Cal.Rptr. 706, 709)." *Simmons v. So. Pac. Trans. Co* (1976) 62 Cal.App.3d 341. 368, 133 Cal.Rptr. 42, 58.

D. BY ROTELY TRANSFERRING THE CONSTITUTIONAL ARGUMENT FROM A WHOLLY STANDARDLESS AND NON-PROPORTIONAL PUNITIVE DAMAGE SYSTEM TO A REGULATED AND PROPORTIONAL SYSTEM, THE ARGUMENT LOSES IT LOGIC AND NECESSARILY LEADS TO THE "CONSTITUTIONALIZATION" OF THE CIVIL DAMAGE SYSTEMS OF ALL FIFTY STATES.

(ftn. continued)
U.S.C. § 1983 upon a showing of "some degree of bad faith or improper motive . . ."

The comment of the Chief Justice in *Lavoie* with respect to the constitutional issue, was made in the context of the applicable Alabama law. As recently stated by that state's high court, "[W]e have repeatedly held that punitive damages need not necessarily bear any particular relationship to compensatory damages." *Nationwide Mutual Insurance Co. v. Clay*, 525 So.2d 1339 (Ala. 1987). As pointed out in footnote 18 herein, juries in Alabama are given "no instruction as to standards for imposing punitive damages." Likewise, in *Bankers Life* Justice O'Connor's reference to "wholly standardless discretion" was based on Mississippi law.

In California, however, juries are instructed in, and reviewing courts are guided by, principles of proportionality, *i.e.*, (1) proportionality to compensatory damages; (2) proportionality to the defendant's ability to pay, and (3) proportionality to the conduct of the defendant. The *Bankers Life* and *Lavoie* arguments, having whatever degree of appeal they had with respect to Alabama and Mississippi law, simply have no application to the California statutory system of punitive damages.

In fact, these arguments would, indeed, be more relevant to California's compensatory damage law. Compensatory awards for general damages in a personal injury action are proportional only to "a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy" and for which "no method is available to the jury by which it can objectively evaluate such damages." *Beagle v. Vasold*, 65 Cal.2d 166 (1966). On appeal, a "shock the conscience" standard is employed. *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61, 118 Cal.Rptr. 184.

As such compensatory awards are "open-ended" and subject to substantially less proportionality and less standards than punitive awards in California, are *all* California

tortfeasors being deprived of procedural and substantive due process rights? Will Petitioner seek to have this Court "constitutionalize," and closely regulate, the civil tort systems of all 50 states?[22] A merely inadvertent automobile driver or a faultless product manufacturer, who renders another quadriplegic, and stands to lose 100% (not just 1/2 of 1%) of his assets, is surely entitled to at least as much due process protection against "open-ended" and "standardless" awards. Would Petitioner also constitutionalize the ongoing policy debate as to the wisdom of fixed versus discretionary sentencing schemes and seek to invalidate the myriad of state laws which typically set a very wide range of punishment for a given offense and give judges almost unreviewable discretion in fixing sentences — laws which have been held not to violate due process? *See Garcia v. United States*, 769 F.2d 697, 699, n.1 (11th Cir. 1985). As this Court has noted in *dicta*, "legislatures [are] free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). Even in capital sentencing, the constitutional limits are based on the Eighth Amendment and not the Due Process Clause. *See Gregg v. Georgia*, 428 U.S. 153 (1976) and *Lockett, supra*. Does Petitioner seek to secure *greater* due process rights for punitive damage defendants than criminal defendants?

If punitive damages must be limited to analogous criminal penalties, as Petitioner urges (Petition, page 15), then should the punitive award here have been the monetary equivalent of the criminal penalty of six years in prison for the crime of

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22 "*New York Times Co. v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander." *Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.* 105 S.Ct. 2939, 2949, 472 U.S. 749, 766, 86 L.Ed.2d 593 (1985) (Justice White, concurring). This "process" will apparently continue during the present term. (*See Harte-Hanks Communications v. Connaughton*, 88-10.)

extortion coupled with the destruction of property (California Penal Code sections 520 and 12022.6)? If one week of net income to Metromedia is $14,000,000, six years of net income would be $3,768,000,000. Is this the analogous criminal penalty which demonstrates the constitutional excessiveness of the subject $14,000,000 award? Is one week of net income excessive when compared to six years in prison? That argument may have superficial appeal in insurance bad faith cases — but not here. If, again as Petitioner argues, it "was assessed a punishment of $14,000,000 [23] by the court below for conduct facially authorized by a provision of a contract,"[24] then why were Metromedia's due process rights not also violated by the 3.8 million dollar compensatory award?

Simply stated, the incredible degree of judicial activism and interference with federal/state relationships which Petitioner seeks to create by yet-unarticulated federal due process standards designed to regulate state civil damage actions, is logically, practically and constitutionally unjustified.

The Petition is fatally flawed by confusing the wisdom of California's statutory punitive damage system with its federal constitutionality. Says Petitioner: "[T]he question

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[23] Petitioner's incessant reliance upon the *intrinsic* amount of the award to advance its arguments is logically, and constitutionally, irrelevant. The amount of the award is *the product of* the application of proportionality standards, the *absence of which* caused concern to Justice O'Connor in *Bankers Life*. If the constitutional inquiry is to focus only on the intrinsic amount of the award, then is it unconstitutional to exact a tax of $14,000,000 or a criminal or administrative fine of $14,000,000 under any circumstances? Do we throw proportionality and standards out the window when the dollar amount becomes "too much"? Is the death penalty "cruel and unusual punishment" under *all* circumstances — or only in light of the particular facts?

[24] It would seem difficult to imagine a contract which "facially authorizes" the concededly vindictive destruction of another's life's work by an unsuccessful extorter — as factually resolved by the judgment here.

whether a 'punitive "fine" should be imposed after a *civil* trial' *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) . . . is manifestly of great importance and worthy of plenary consideration by this Court in the case at bar." (Petition, p. 14.). In *Smith v. Wade*, the Court was concerned with *interpreting legislative intent* whether punitive damages should be imposed under § 1983. Here, the Court is not concerned with reviewing the wisdom of the decisions made by its state counterparts and state legislatures — only the constitutionality of those decisions. Thus, Petitioner seeks to use "due process" as a sword to strike down what it believes to be bad public policy of the states.

Not only is it not the function of the United States Supreme Court to strike down laws on the grounds that such laws are bad public policy, but the constitutional invalidation of the California punitive damage system as "open-ended" and "standardless" would necessarily lead to the invalidation of much of the compensatory civil damage and criminal sentencing mechanisms of most of the states in that they are as much, or more, "open-ended" and "standardless."

Congress has chosen not to "federalize" the state punitive damage laws. It is respectfully submitted that this Court not accomplish the same result through "constitutionalization" and that the matter, at least for the time being, be left to the states, under the guidance of *Bankers Life*.

E. NON-FIRST AMENDMENT DEFENDANTS WHO ACT WITH ACTUAL MALICE ARE NOT DESERVING OF GREATER CONSTITUTIONAL SAFEGUARDS AGAINST PUNITIVE DAMAGES THAN THOSE AFFORDED DEFAMATION DEFENDANTS UNDER THE FIRST AMENDMENT.

In an extended series of decisions forged over the past 25 years, the Court, observing that "freedom of expression upon public questions is secured by the First Amendment" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 at 721, 11 L.Ed.2d 686 (1964), and that "debate on public issues should be uninhibited, robust and wide-open" (*id.* at 721), hold that the First Amendment limits the reach of state defamation laws. Thus, a public official (*New York Times Co. v. Sullivan, supra*), public figure (*Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)), or private figure as to public matters (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), and *Dun and Bradstreet Inc. v. Greenmoss Builders Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)), may not recover punitive damages absent proof, by clear and convincing evidence, that the defendant acted with " 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (*New York Times Co. v. Sullivan, supra*, 376 U.S. at 280).

Petitioner and defendant, here, seeks to have this Court impose in all punitive damage cases — whether First Amendment interests are implicated or not — "some or all of the procedural rights enjoyed by defendants in criminal proceedings" (Petition, page i, "Questions Presented"), and some sort of "constitutional cap" on the dollar amount of all punitive awards, under the Eighth and Fourteenth Amendments (*id.*).

In the punitive damage defamation cases — whether involving public official or private figure plaintiffs, media or non-media defendants and regardless of the importance of the public issue addressed by the alleged falsehood — there is no requirement of a unanimous jury, a privilege against self-incrimination, proof beyond a reasonable doubt, a prohibition against double jeopardy, a prohibition against excessive fines or a "treble damage" limitation, or any other type of "cap" on the amount of punitive damages.

Here, in an action involving the breach of fiduciary duties and not even remotely implicating First Amendment interests, why should the defendant be afforded *greater* protections? Simply stated, it would be highly anomalous to bestow greater constitutional safeguards on non-First Amendment, punitive damage defendants than the protections afforded First Amendment, punitive damage defendants.[25]

CONCLUSION

It is respectfully submitted that the petition be denied, the stay dissolved, and this litigation be allowed to avoid its thirteenth anniversary.

Respectfully submitted,

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25 Even if the First Amendment were implicated here, this judgment would not offend the *New York Times* "actual malice" and "clear and convincing" standards. In California, "Malice as used in Civil Code section 3294 means malice in fact, not malice in law" (*Simmons v. So. Pac. Trans. Co., supra*); and it was the defendant who requested that the jury be instructed on preponderance of the evidence as opposed to "clear and convincing" evidence.

APPENDIX A

Excerpts From Reporter's Trial Transcript Testimony of Metromedia Vice President Richard Woollen

"Q. So your logical conclusion from looking at the letter is that in November of 1969, when you sent that letter, and in December of 1969, *Metromedia didn't have the rights that they needed and they were going to try and get those from Paul Winchell*?

"A. Correct. We didn't have the right to make any other telecasts.

"Q. And you were going to try to get those from Winchell, correct?

"A. Yeah." (RT 908.)

"Q. And when you told Mr. Winchell that you were going to erase his tapes, and when you told Mr. Winchell that you were not going to sell him the tapes at any price unless he agreed to the proposal on telecasting and syndication, *at that time Metromedia didn't not [sic] have the right to syndicate those programs, did they*?

"A. *Not to my knowledge, no, because the other term had expired.*" (RT 918.)

"Q. The counterproposal that you were inviting — you didn't even have any right to make a

counterproposal or syndication *because you didn't have any rights to syndicate, did you*?

"A. *Not at that time, no.*" (RT 919)

"Q. As far as this situation is concerned, Mr. Woollen, am I not correct that what Metromedia was saying when they told you to erase the tapes is '*Mr. Winchell wouldn't agree to what we wanted him to agree to. We'll show him. We're going to erase the tapes.*'?

"A. *Yes.*' (RT 929)

"Q. And I take it at Metromedia, the management took the position that 'If we're going to use the quote "technique," we're going to follow through on it. *And if the man doesn't agree, we erase the tapes.*'

"A. *Yes.*

"Q. And so by following through on the 'technique,' you showed Mr. Winchell that you meant what you said in your letter of March 31, 1970?

"A. Yes." (RT 984)

"Q. And since you were the people who controlled the tapes, did you consider it appropriate to tell him you were going to erase those tapes *so he'd never be able to go forward with his syndication*?

"A. *That was management's decision, yes.*" (RT 921)

"Q. You considered the ultimatum — and I use the word ultimatum — 'either you negotiate or we erase your tapes' — an appropriate method to negotiate on behalf of Metromedia; is that correct.

"A. Yes.

"Q. All right. And you were doing this as the Vice-President of Metromedia, managerial capacity, correct?

"A. Yes." (RT 909) (Emphasis added.)

APPENDIX B

California Statutes Regulating Punitive Damages

1. Civil Code Section 3294 [not allowable in contract actions]

2. Code of Civil Procedure Section 425.13 [court order required to plead punitive damages against health care provider]

3. Civil Code Section 3340 [injury to animals]

4. Civil Code Section 48a [hatred or ill will toward plaintiff required for punitive damages against media]

5. Civil Code Section 3346 [injury to timber; punitive award either double or five times actual injury depending on culpability]

6. Civil Code Section 41 [punitive damages not allowed against minor or incompetent]

7. Civil Code Section 956 [not allowed in wrongful death action]

8. Code of Civil Procedure Section 734 [certain trespasses, actual damages only]

9. Code of Civil Procedure Section 735 [forcible entry, treble damages]

10. Code of Civil Procedure Section 1174 [unlawful detainer, treble damages]

11. Government Code Section 818 [no punitive damages against governmental entity]

12. Probate Code Section 792 [double liability for fraudulent sale]

13. Public Utilities Code Section 8203 [double damages against water company]

14. Code of Civil Procedure Section 732 [waste or property, treble damages]

15. Code of Civil Procedure Section 733 [trespass, treble damages]

16. Code of Civil Procedure Section 1174 [unlawful detainer, treble damages]

17. Civil Code Section 1176 [solicitation of payment for goods or services not ordered, treble damages]

18. Civil Code Section 1745 [wilful violation of sale of fine prints law, treble damages]

19. Civil Code Section 1747.50 [wilful failure to correct credit card billing error, treble damages]

20. Civil Code Section 1785.31 [violation of Consumer Credit Reporting Law, not less than $100 nor more than $5,000]

21. Civil Code Section 1787.3 [Consumer Credit Denial, $10,000 in individual action, lesser of $500,000 or 1% of net worth in class action]

22. Civil Code Section 1812.19 [wilful violations of retail instalment sale finance charge regulations, treble damages]

23. Civil Code Section 1812.31 [violation of equal credit for women law, $10,000 in individual action, lesser of $100,000 or 1% of defendant's net worth in a class action]

24. Civil Code Section 1812.62 [violation of Dance Studios Services Act, treble damages]

25. Civil Code Section 1812.94 [violation of Health Studios Services Act, treble damages]

26. Civil Code Section 1916.3 [violation of usury law, treble damages]

27. Probate Code Section 612 [double damages for embezzlement or fraudulent sale of decedent's property]

28. Business and Professions Code Section 16750 [violation of Cartwright Act, treble damages]

29. Business and Professions Code Section 17082 [violation of unfair trade practices, treble damages]

30. Health and Safety Code Section 25359 [failure, without sufficient cause, to report an authorized release of a hazardous substance, treble damages]

APPENDIX C

PETITION FOR REVIEW
FILED JULY 10, 1988
Pages 11, 12, 13

C. Constitutional Objections to Punitive Damages.

Punitive damages are a troubling anomaly in our legal system because they may be imposed for transgressions of "loose and unlimiting" standards[16] and because no "compensatory purpose limits the amount of the fine."[17]

Nearly every member of the United States Supreme Court has expressed some reservation, concern or dissatisfaction with punitive damages. For example, Chief Justice Rehnquist has characterized punitive damages as " 'quasi-criminal' " and has said that "the alleged deterrence achieved by the punitive damages awards is likely outweighed by the costs." *Smith v. Wade*, 461 U.S. 30, 59, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983) (dissenting opinion). Justice Brennan has criticized punitive damages as encouraging unnecessary litigation and chilling desirable conduct, especially when the standards on which the awards are based are not well defined. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n.4, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (dissenting opinion). Justice Marshall has opined that punitive damages are "unpredictable" and "may be employed to punish unpopular defendants." *International Brotherhood of Electrical*

(ftn. continued)
See, e.g., Clark v. San Francisco etc. Railway Co., 142 Cal. 614, 76 P. 507 (1904) (plaintiff seeking to amend prayer for damages should do so before verdict so that defendant may have proper notice of the higher demand.)

16 *Giacco v. Pennsylvania, supra* n.9, 382 U.S. at 402.

17 *Hicks v. Feiock*, 56 U.S.L.W. 4347, 4353-4354 (U.S. April 26, 1988) (O'Connor, J., dissenting).

Workers v. Foust, 442 U.S. 42, 48, 50-51 n.14, 99 S. Ct. 2121, 60 L. Ed. 2d 698 (1979). Justice Blackmun has referred to punitive damages as private fines (*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 260, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984)), and has questioned both the deterrent and windfall aspects of punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). Justice Kennedy has referred to the "serious and often unpredictable effects of . . . punitive damages" and has characterized punitive damages as a "hybrid of civil and the criminal law." *In re Paris Air Crash*, 622 F.2d 1315, 1319-20, 1322 (9th Cir. 1980), *cert. denied sub nom., Kalinsky v. General Dynamics Corp.*, 449 U.S. 976, 101 S. Ct. 387, 66 L. Ed. 2d 237 (1980).

Two years ago the United States Supreme Court examined whether a $3,500,000 punitive damage award violated the Contracts Clause (Art. I, §10), the Excessive Fines Clause (Eighth Amendment), and the Due Process Clause (Fourteenth Amendment) of the United States Constitution. While not reaching the merits of those issues in that case, the Court ruled that "[t]hese arguments raise important issues which, in an appropriate setting, must be resolved." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

Just two months ago, the United States Supreme Court again considered these same constitutional challenges to punitive damages. While once again avoiding the issues on the merits because they had not been properly ventilated in the court below, the Court stated that they presented "question[s] of some moment and difficulty." *Bankers Life and Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418, 4420 (U.S. May 16,

1988). Because of their " 'great public importance,' " the Court determined to "adhere scrupulously" to the customary limits on the Court's willingness to hear a case. *Id.* However, the Court expressly encouraged the resolution of these constitutional questions "in the first instance" in the state courts so that "any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and reasoned opinion on the merits." *Id.* at 4421.

In a concurring opinion in *Bankers Life*, Justice O'Connor and Justice Scalia stated that "because of the punitive character of [punitive damage] awards," (56 U.S.L.W. at 4423) "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." (*Id.*) Petitioner has advanced the same argument in this case, and that Section 3294 of the California Civil Code, which allows juries to award punitive damages without any statutory ceiling on the amount of the award, is unconstitutional.

Petitioner has pursued under the United States Constitution and its California counterparts (Art. I, § 7(a); Art. I, § 17) the same constitutional questions in this case which have now twice been labeled "important" by the United States Supreme Court. The *April II* court rejected them all as having been decided by this Court in *Peterson v. Superior Court*, 31 Cal. 3d 147, 181 Cal. Rptr. 784, 642 P.2d 1305 (1982). However, insofar as relevant to the issues raised here, the *Peterson* court only held that the "procedural guarantees" of the due process clause are not available because of the "civil nature of punitive damages." 31 Cal. 3d at 161. The *Peterson* decision did not resolve under either the United States or California Constitutions the substantive Due Process Clause and Excessive Fines Clause

issues presented by petitioner. Thus, the latter issues have not been decided by the highest court of California. As properly presented "important" constitutional questions, they should be reviewed and resolved.

Petitioner also respectfully submits that this Court was in error in *Peterson*, and that the Court of Appeal decision cited by *April II, Downey Savings and Loan Association v. The Ohio Casualty Insurance Company*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 56 U.S.L.W. 3818 (U.S. May 31, 1988), was equally erroneous, in holding that certain constitutional protections are only available in criminal cases. The Supreme Court has held that "some punishments though not labeled 'criminal' by the State may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 669 n.37, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

This Court should address and resolve the constitutional objections to punitive damages raised in this case. Punitive damages are, indeed, quasi-criminal and the constitutional protections available to all citizens to protect them from capricious, retroactive, unequal and excessive punishments are applicable to punitive damages.

APPENDIX D

DEFENDANT METROMEDIA'S PROPOSED JURY INSTRUCTION NO. 85

If you find that April suffered damages on its tort claims as a proximate result of the conduct of Metromedia on which you base a finding of liability, you may then consider whether you should award punitive damages against Metromedia for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that Metromedia was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability.

"Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or carried on by the defendant with a conscious disregard for the rights or safety of others. A person acts with conscious disregard of the rights or safety of others when he is aware of the probable dangerous consequences of his conduct and willfully and deliberately fails to avoid those consequences.

"Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

"Fraud" means an intentional misrepresentation, deceipt, [*sic*] or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the

jury's sound discretion, exercised without passion or prejudice. (In deciding whether to impose punitive damages to punish Metromedia, you may consider the good faith belief of a party, the custom at the time in the television industry with respect to syndication, the nature and size of Metromedia from 1965 to 1972; the fact that no one involved in this dispute is still employed by Metromedia, and the fact that Metromedia is no longer in the television industry.)

In arriving at an award of punitive damages, if any, you may also consider the following:

(1) the reprehensibility of the conduct of the defendant,

(2) the amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) that the punitive damages must bear a reasonable relation to the actual damages.

If you find that April is entitled to an award of punitive damages against Metromedia, you shall state the amount of punitive damages separately in your verdict. [BAJI 14.71 (modified)]

APPENDIX E

DEFENDANT METROMEDIA'S PROPOSED JURY INSTRUCTION NO. 56

April must prove by clear and convincing evidence that the alleged 1968 Agreement superseded the 1965 Agreement. If April cannot prove this, then you must determine that the parties' rights under the 1965 Agreement were unchanged.

APPENDIX F

TRIAL AND REVIEWING COURT ACTION ON PUNITIVE AWARDS
(1922 - 1986)

Morris v. Standard Oil Co. 188 Cal. 468 (1922)	$ 25,000	Remanded for new trial re damages; excessive.
Wilkinson v. Singh 93 Cal.App. 337 (1928)	1,500	Remanded for new trial unless $300.00.
Livesey v. Stock 208 Cal. 315 (1929)	50,000	New trial ordered unless remitted for $10,000.
Booth v. Peoples Finance etc. Co. 124 Cal.App. 131 (1932)	1,500	Remanded for new trial unless remitted for $500.
Washer v. Bank of America National Trust & Sav. Assoc. 87 Cal.App.2d 501 (1948)	80,000	Reversed by trial judge on JNOV; affirmed.
Finney v. Lockhart 35 Cal.2d 161 (1950)	2,000	Affirmed.

Luke v. Mercantile Acceptance Corp. 111 Cal.App.2d 431 (1952)	2,500	Retrial ordered on issue of punitive damages.
Larrick v. Gilloon 176 Cal.App.2d 408 (1959)	10,000	Upheld.
DiGiorgio Fruit Corp. v. AFL-CIO 215 Cal.App.2d 560 (1963)	50,000	Upheld.
Toole v. Richardson-Merrell, Inc. 251 Cal.App.2d 689 (1967)	500,000	New trial ordered unless remitted to $250,000.
Oakes v. McCarthy Co. 267 Cal.App.2d 231 (1968)	77,500	Trial judge reduced to $59,300; affirmed.
Cunningham v. Simpson 1 Cal.3d 301 (1969)	25,000 Unsegregated	Unsegregated damages excessive; remanded for new trial.
Ferraro v. Pacific Finance Corp. 8 Cal.App.3d 339 (1970)	33,000	Affirmed.

Fletcher v. Western National Life Ins. Co., 10 Cal.App.3d 376 (1970)	640,000	Reduced to $180,000.
Wetherbee v. United Ins. Co. 18 Cal.App.3d 266 (1971)	500,000	Reduced to $200,000.
Forte v. Nolfi 25 Cal.App.3d 656 (1972)	Unsegregated Damages	Remanded on issue of damages; $20,000 punitives excessive.
Field Research Corp. v. Patrick 30 Cal.App.3d 603 (1973)	150,000	Upheld.
Schroeder v. Auto Driveaway Co. 11 Cal.3d 908 (1974)	10,000	Upheld.
Bertero v. National General Corp. 13 Cal.3d 43 (1974)	625,000	Affirmed as proper.
Roemer v. Retail Credit Co. 44 Cal.App.3d 926 (1975)	250,000	Affirmed.

Farmy v. College Housing, Inc. 48 Cal.App.3d 166 (1975)	45,000	Trial court reversed damages; insufficient evidence for punitive.
Beck v. State Farm Mut. Auto Ins. Co. 54 Cal.App.3d 347 (1976)	75,000	Trial judge denied JNOV; appellate court modified to strike all punitives.
Allard v. Church of Scientology 58 Cal.App.3d 439 (1976)	250,000	Reduced by appellate court to $50,000.
Weisenburg v. Molina 58 Cal.App.3d 478 (1976)	28,240.18	Affirmed.
Merlo v. Standard Life & Acc. Ins. Co. 59 Cal.App.3d 5 (1976)	500,000	Reversed as excessive.
Zhadan v. Downtown L.A. Motors 66 Cal.App.3d 481 (1976)	175,000 first trial	Trial judge ordered new trial unless remitted to $50,000; plaintiff did not remit. (App. ct. affirmed trial judge.)

Little v. Stuyvesant Life Ins. Co. 67 Cal.App.3d 451 (1977)	2,500,000	Appellate court remanded for new trial unless reduced to $250,000.
Henderson v. Security National Bank 72 Cal.App.3d 764 (1977)	125,000	Reversed punitive award due to insufficient evidence; affirmed.
Neal v. Farmers Insurance Exchange 21 Cal.3d 910 (1978)	1,518,637	Reduced to $740,000.
Walker v. Signal Companies, Inc. 84 Cal.App.3d 982 (1978)	215,000	Affirmed.
Grimshaw v. Ford Motor Company 119 Cal.App.3d 757 (1981)	125,000,000	Reduced by trial court to $3.5 million; affirmed.
Egan v. Mutual of Omaha 24 Cal.3d 809 (1979)	5,000,000	Reversed as excessive.
Agarwal v. Johnson 25 Cal.3d 932 (1979)	47,000	Affirmed.

Bindrim v. Mitchell 92 Cal.App.3d 61 (1979)	25,000	Affirmed.
Delos v. Farmers Insurance Group, Inc., 93 Cal.App.3d 642 (1979)	4,000,000	Trial court ordered new trial unless remitted to $350,000; affirmed on appeal.
Zhadan v. Downtown L.A. Motors 100 Cal.App.3d 821 (1979)	90,000 second trial	Damages in second trial affirmed on appeal.
Miller v. Elite Ins. Co. 100 Cal.App.3d 739 (1980)	150,000	Affirmed.
Rosener v. Sears, Roebuck & Co. 110 Cal.App.3d 740 (1980), *appeal dismissed* 450 U.S. 1051 (1981)	10,000,000	Remanded for new trial unless remitted for $2.5 million.
Schomer v. Smidt 113 Cal.App.3d 828 (1980)	16,000	Affirmed.

Pistorius v. Prudential Ins. Co. 123 Cal.App.3d 541 (1981)	1 million	Affirmed.
Chodos v. Insurance Co. of North America, 126 Cal.App.3d 86 (1981)	200,000	Affirmed.
Godfrey v. Steinpress 128 Cal.App.3d 154 (1982)	60,000	Affirmed.
Austero v. Washington National Ins. Co. 132 Cal.App.3d 408 (1982)	200,000	Affirmed.
Burnett v. National Enquirer, Inc. 144 Cal.App.3d 991 (1983)	1.3 million	Trial court remitted to $750,000. Appellate court remanded for new trial unless remitted to $150,000.
Vossler v. Richards Manufacturing Co. 143 Cal.App.3d 952 (1983)	500,000	Affirmed.

Krusi v. Bear Stearns & Co. 144 Cal.App.3d 664 (1983)	50,000	Remanded.
Seaman's Direct Buying Service Inc. v. Standard Oil Co. 36 Cal.3d 752 (1984)	11 million	Trial judge ordered new trial unless remitted to 7 million; underlying judgments reversed by appellate court for retrial.
Moore v. American United Life Insurance Co. 150 Cal.App.3d 610 (1984)	2.5 million	Affirmed.
Betts v. Allstate Insurance Co. 154 Cal.App.3d 688 (1984)	3 million	Affirmed.
Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. 155 Cal.App.3d 381 (1984)	80,000	Affirmed.
Fleming v. Safeco Insurance Co. 160 Cal.App.3d 31 (1984)	116,000	Affirmed.

Goshgarian v. George 161 Cal.App.3d 1214 (1984)	15,000	Vacated by appellate court unless remitted to $7,500.
Sanchez-Corea v. Bank of America 38 Cal.3d 892 (1985)	1 million	Trial judge ordered new trial; Supreme Court reversed order.
Sprague v. Equifax Inc. 166 Cal.App.3d 1012 (1985)	5 million	Trial judge ordered new trial unless remitted to 1 million; appellate court affirmed trial judge.
Jahn v. Brickey 168 Cal.App.3d 399 (1985)	250,000	Trial judge ordered new trial unless remitted to 100,000; appellate court affirmed trial court.
Wayte v. Rollins International, Inc. 169 Cal.App.3d 1 (1985)	1.5 million	Remitted to $308,000.
Frazier v. Metropolitan Life Insurance Co. 169 Cal.App.3d 90 (1985)	8 million	Trial court remitted to 2 million; appellate court vacated entirely.

Greenfield v. Spectrum Investment Corp. 174 Cal.App.3d 111 (1985)	442,500	Trial judge ordered new trial unless remitted to $215,000; appellate court reinstated judgment because of failure to state reasons for new trial.
California Shoppers, Inc. v. Royal Globe Insurance Co. 175 Cal.App.3d 1 (1985)	2 million	JNOV granted by trial judge; affirmed by appellate court.
Troensegaard v. Silvercrest Industries, Inc. 175 Cal.App.3d 218 (1985)	55,000	Punitive damages vacated.
Ball v. Posey 176 Cal.App.3d 1209 (1986)	40,000	Affirmed.
Ramona Manor Convalescent Hospital v. Care Enterprises 177 Cal.App.3d 1120 (1986)	2.5 million	Reversed for retrial.

Pusateri v. E.F. Hutton & Co., Inc. 180 Cal.App.3d 247 (1986)	160,000	Affirmed.
Campbell v. McClure 182 Cal.App.3d 806 (1986)	100,000	Affirmed.
Duggan v. Hasso 185 Cal.App.3d 1184 (1986)	1.1 million	Reversed for retrial.
Flyer's Body Shop Profit Sharing Plan v. Ticor Title Insurance Co. 185 Cal.App.3d 1149 (1986)	250,000	Vacated on appeal.
Travelers Insurance Co. v. Lesher 187 Cal.App.3d 169 (1986)	1.5 million	Vacated on appeal.
Hobbs v. Eichler 164 Cal.App.3d 174 (1985)	220,000	Affirmed.
Horn v. Guaranty Chevrolet 270 Cal.App.2d 447 (1969)	15,000	Affirmed.

MacDonald v. Joslyn 275 Cal.App.2d 282 (1969)	50,000	Affirmed.
Anglo-American General v. Jackson Life Ins. Co. 83 F.R.D. 41, applying Calif. law (1979)	100,000	Remitted by trial court $5,000.